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JAMBATAN MERAH SDN BHD (IN LIQUIDATION) v. PUBLIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUIT NO: 22NCC-335-09-2014]
27 NOVEMBER 2015

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LAND LAW: *Charge – Redemption of – Terms and condition in charge – Chargor requested for discharge statement from bank – Whether clauses in charge entitled chargor to be given discharge statement – Whether failure by bank to provide discharge statement amounted to breach – Whether chargor could claim for loss or damage arising from bank's breach*

C

LAND LAW: *Charge – Redemption of – Land charged to bank for banking facilities – Whether charge confined to chargor's indebtedness – Whether chargor's indebtedness included sums owed by companies related to chargor*

D

LAND LAW: *Charge – Remedies of chargee – Exercise of rights under s. 271(1)(a) of National Land Code (NLC) – 'Corresponding form of qualified title' in s. 270(1)(c) NLC – Whether applied to qualified title – Whether qualified title distinct from land office title – Whether chargee barred from issuing Form 16J*

E

CONTRACT: *Damages – Breach – Land charged to bank for banking facilities – Chargor requested for discharge statement from bank – Whether failure by bank to provide discharge statement amounted to breach – Whether chargor suffered loss or damages from bank's breach – Whether loss claimable and not too remote – Whether chargor entitled to damages – Contracts Act 1950, s. 74*

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The plaintiff was a wholly-owned subsidiary of Swee Joo Bhd and was related to other subsidiaries of Swee Joo Bhd ('the related companies'). The defendant granted various banking facilities to the plaintiff which was secured by three charges over three pieces of land belonging to the plaintiff *ie*, Lot No. 28, Lot No. 28A and Lot No. 31. In order to resolve the related companies' debts, the plaintiff, defendant and the related companies entered into a restructure and reschedule arrangement ('R&R arrangement'). The R&R arrangement was contained in four letters from the defendant to each of the related companies which the plaintiff had accepted by signing all four documents. The defendant issued a letter dated 14 October 2010 stating the terms for the plaintiff's 'redemption' of Lot No. 28A and subsequently issued a second letter dated 25 October 2010 to the plaintiff stating the terms for the plaintiff's 'redemption' of the three lots. The plaintiff and the related companies accepted the defendant's letter dated 25 October 2010 and redeemed Lot Nos. 28 and 28A. The plaintiff was wound up on 19 September 2011 and leave was granted to the liquidator to 'enter into a license/tenancy/lease agreement' in respect of Lot No. 31 for the purpose of the plaintiff's liquidation. Pursuant to the court's leave, the liquidator let out Lot No. 31 to the tenant by way of a tenancy agreement. The defendant, claiming that

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the plaintiff was still indebted to the defendant, issued two separate notices to the tenant in Form 16J that it had exercised its powers under s. 271 of the National Land Code ('NLC') to enter into possession of Lot No. 31 by receiving rent from the tenant. In September 2012, the plaintiff filed the first suit against the defendant claiming for, among others: (i) a declaration that no R&R arrangement under s. 176 of the Companies Act 1965 existed between the plaintiff, related companies and the defendant; (ii) a declaration that the banking facilities had been fully settled by the plaintiff; and (iii) an order to direct the defendant to deliver to the plaintiff within seven days from the date of service of the order, the issue document of title of Lot No. 31 and a duly executed and registrable instrument of discharge of the charge. The High Court allowed the first suit which was however reversed by the Court of Appeal. The plaintiff's application to the Federal Court for leave to appeal against the decision in the first suit is still pending. Subsequently, on 9 July 2014, the plaintiff requested from the defendant for a 'redemption' statement of Lot No. 31, followed by a second request on 27 November 2014. There was no reply from the defendant. The plaintiff thereafter filed the present suit against the defendant. The liquidator, testifying for the plaintiff, gave evidence, among others, that: (i) the sale proceeds from Lot Nos. 28 and 28A had been 'wrongly' utilised by the defendant to settle the related companies' debts; (ii) the defendant could not claim more than what the defendant had 'admitted' in the first suit; (iii) the indebtedness sum wrongfully included the related companies' debts; and (iv) the liquidator let out Lot No. 31 to the tenant pursuant to the leave of court and hence, the defendant could not exercise its rights as chargee of Lot No. 31 under s. 271 of the NLC because Lot No. 31 was held under a 'qualified title' ('QT'). The issues to be decided in the present suit were: (i) whether the plaintiff was entitled to be given a statement of the plaintiff's indebtedness to the defendant under the charge ('indebtedness') so as to enable the plaintiff to discharge the charge ('discharge statement'); (ii) if the plaintiff was entitled to be given a discharge statement by the defendant and if the defendant failed to do so ('defendant's breach'), had the plaintiff suffered any loss or damage arising from the defendant's breach which could be claimed by the plaintiff from the defendant.

Held (allowing plaintiff's application):

(1) Construction of contracts is a question of law to be decided by the court. Under ss. 243 and 249 of the NLC, the nature and extent of the rights and obligations of both the plaintiff and defendant were dependent on the terms and conditions stated in the charge and charge annexure. By virtue of s. 243 of the NLC, upon the registration of the charge, Lot No. 31 was security for the repayment of the plaintiff's indebtedness to the defendant as provided in the charge, including the charge annexure. Clauses 46 and 62 of the charge annexure confer a right on the plaintiff to discharge the charge and therefore, by necessary

implication, the clauses (i) entitled the plaintiff to be given a discharge statement by the defendant upon such a request by the plaintiff to the defendant; (ii) obliged the defendant to provide a discharge statement to the plaintiff after the defendant has received such a request from the plaintiff; and (iii) the discharge statement should contain a precise sum of money for the plaintiff to discharge the charge on a certain date in the future with the manner and details of computation. (paras 27, 29 & 31)

(2) Alternatively, the plaintiff's right to be given a discharge statement by the defendant was implied in the charge because both the subjective test of 'officious bystander' and the objective test of 'business efficacy' laid down in the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* had been satisfied in respect of the implied term to provide discharge statement. There was also a pragmatic reason to support the duty of a chargee to supply a discharge statement to the chargor under the charge, *ie*, because only the chargee and not the chargor, will know the exact amount to be paid by the chargor to discharge the charge. (paras 32, 33 & 35)

(3) The defendant's breach had been committed when the defendant did not provide a discharge statement as requested by the plaintiff on 9 July 2014 and 27 November 2014. In the interest of banking consumers in particular and in the overall interest of the banking industry, banks should provide 'accurate, clear, timely and not misleading' discharge statements upon requests by chargors. It was neither prudent nor acceptable for any bank not to reply to a letter from its customer, as in this case. The defendant's breach was continuous as until the date of the court's oral decision on 5 June 2015, the defendant had not provided a discharge statement to the plaintiff. (paras 38, 40 & 41)

(4) The issue of whether a party may claim for loss and damage arising from an agreement depends on the application of s. 74 of the Contracts Act 1950 ('CA'). It is trite law that the plaintiff bears the legal burden to prove loss and damage as a result of the defendant's breach on a balance of probabilities. The plaintiff had not adduced any evidence in this trial to prove that the plaintiff has suffered any loss or damage due to the defendant's breach. Neither was evidence produced that there had been a party who was interested to purchase Lot No. 31 and such a purchase could not be effected due to the defendant's breach. Even if the plaintiff had suffered any loss or damage due to the defendant's breach, the plaintiff must prove that the alleged loss was claimable and was not too remote under either one or both the limbs of s. 74(1) of the CA. However, even assuming that the plaintiff could prove the alleged loss, it did not fall within the ambit of any one or both the limbs in s. 74(1) of the CA. Accordingly, the plaintiff was not entitled to any damages in respect of the defendant's breach. (paras 43, 45, 46 & 47)

(5) The related companies' debts were secured under the charge and charge annexure based on the reasons that, *inter alia*, para. (c) of the charge secured the payment of money with interest as provided in the charge annexure and the plaintiff had agreed to bear the related companies' debts by signing the defendant's four letters. As such, the related companies' debts fell within the definition of 'indebtedness' in cl. 1(c). The charge did not confine 'indebtedness' to what was owed to the defendant in the plaintiff's own account with the defendant. To the contrary, cls. 46 and 62 clearly provided that 'indebtedness' may include sums in the accounts of third parties (such as the related companies) as agreed by the plaintiff. In the circumstances, it was immaterial that the R & R arrangement and the plaintiff's separate arrangement had been agreed by the plaintiff two years after the registration of the charge. (paras 52 & 53)

(6) The defendant had not realised its security in Lot No. 31 within the six month period, and thus could not claim any interest after the plaintiff had been wound up. Hence, although the indebtedness included the related companies debts (by reason of the R&R arrangement and the plaintiff's separate arrangement), the indebtedness could not include interest after the date of winding up of the plaintiff. The indebtedness also did not include the defendant's legal costs. (paras 56, 57 & 60)

(7) The question of whether s. 270(1)(a) of the NLC barred the defendant's remedy of possession depended on whether the phrase 'corresponding form of qualified title' in s. 270(1)(c) of the NLC applied to a QT. A code of law, such as the NLC, should be interpreted literally and the literal rule of construction supports disjunctive interpretation. It is clear that under s. 5 of the NLC, a QT is distinct from a land office title. Section 270(1)(a) of the NLC has two different phrases and the phrases must be intended by the Legislature to have two different meanings; and if the meaning of the phrase 'corresponding form of qualified title' (second limb) in s. 270(1)(a) of the NLC is confined by the preceding phrase 'land office title' (first limb), it would render the second limb redundant. Such an approach would be contrary to the canon of construction that the Legislature does not legislate in vain. Hence, the *ejusdem generis* rule could not be invoked to construe s. 270(1)(a) of the NLC (*Haji Abdul Ghani Ishak & Anor v. Public Prosecutor*). (paras 69 & 70)

(8) After a trial, the court has the discretionary power to grant a perpetual mandatory injunction pursuant to ss. 51(2) and 53 of the Specific Relief Act 1950 ('SRA'). Accordingly, the court ordered a perpetual mandatory injunction to compel the defendant to deliver to the plaintiff a discharge statement which contains the sum of indebtedness. Further, as the defendant could not issue Form 16J by reason of s. 270(1)(a) of the NLC, the court exercised its discretion under ss. 50 and 51(2) of the

A SRA to order a perpetual injunction to restrain the defendant from exercising any right in respect of Lot No. 31 under s. 271 of the NLC. (paras 61, 63, 66, 67 & 80)

Case(s) referred to:

All Malayan Estates Staff Union v. Rajasegaran & Ors [2006] 4 CLJ 195 FC ***(refd)***

B *American International Assurance Co v. Koay Fong Eng Administrator of the Estate of Ho Moh Koay, Deceased [1996] 1 BLJ 379 HC* ***(refd)***

Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors [2015] 1 LNS 821 HC ***(refd)***

Chin Choy & Ors v. The Collector of Stamp Duties [1981] CLJ 37; [1981] CLJ (Rep) 1 PC ***(foll)***

Datin Siti Hajar v. Murugasu [1970] 1 LNS 23 HC ***(refd)***

C *Gurbachan Singh v. PP [1967] 1 LNS 50 FC* ***(refd)***

Hj Abdul Ghani Ishak & Anor v. PP [1981] 1 LNS 96 FC ***(refd)***

Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174 SC ***(refd)***

Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal [2004] 1 CLJ 797 CA ***(refd)***

D *Jambatan Merah Sdn Bhd v. Public Bank Bhd [2014] 1 LNS 1657 HC* ***(refd)***

Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***

Malayan United Finance Bhd v. Tan Lay Soon [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292 SC ***(foll)***

Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

E *Ng Yee Fong & Anor v. EW Talalla [1985] 1 LNS 146 FC* ***(foll)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***

Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors And Other Appeals [2013] 2 CLJ 893 FC ***(foll)***

F *Puran Singh v. Kehar Singh Bahadur Singh [1937] 1 LNS 51 HC* ***(refd)***

Re Salvage Engineers Ltd [1962] 1 LNS 167 HC ***(refd)***

Re Thien Kon Thai [2008] 6 MLJ 278 ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(foll)***

Union Insurance Malaysia Sdn Bhd v. Chan You Young [1999] 3 CLJ 517 CA ***(refd)***

G **Legislation referred to:**

Bankruptcy Act 1967, s. 8(2A)

Civil Law Act 1956, s. 4(1), (2)

Companies Act 1965, ss. 176, 291(1), (2)

Contracts Act 1950, s. 74(1)

Courts of Judicature Act 1964, s. 66(1)

H Emergency (Essential Powers) Ordinance No. 22/1970, s. 2(2)

Evidence Act 1950, s. 3

Financial Services Act 2013, ss. 121, 122, 123(1), (2)(a), 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139

National Land Code, ss. 5, 243, 245, 249(1), 256(3), 263(1), 266(1), (2)(a), (b), (c), 270(1)(a), (2) 271(1)(a)

I Rules of Court 2012, O. 18 r. 19(1)(d), O. 34, O. 59 r. 16(4), O. 92 r. 4

Specific Relief Act 1950, ss. 50, 51(2), 53

For the plaintiff - Lee Min Choon (Masitah Alias with him); M/s Lee Min Choon & Co
For the defendant - KK Chan (Winnou Chung with him); M/s Shook Lin & Bok

Reported by S Barathi

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] In this case, the plaintiff company (plaintiff) is the registered proprietor of land which has been charged to the defendant bank (defendant) under the National Land Code (NLC).

[2] The following issues arise in this case:

(a) whether the plaintiff is entitled under the NLC charge to be given by the defendant a statement of the plaintiff's indebtedness to the defendant under the charge (indebtedness) so as to enable the plaintiff to discharge the charge (discharge statement);

(b) if the plaintiff is entitled under the charge to be given a discharge statement by the defendant and if the defendant fails to do so (defendant's breach), has the plaintiff suffered any loss or damage arising from the defendant's breach which can be claimed by the plaintiff from the defendant;

(c) whether the indebtedness:

(i) can include sums of money owed to the defendant by companies related to the plaintiff (related companies' debts);

(ii) can include interest after the plaintiff's winding up;

(iii) can include legal fees paid by the defendant to its solicitors in respect of an earlier suit with the plaintiff (first suit); and

(iv) should follow the defendant's calculation admitted by the defendant in its defence filed in the first suit;

(d) whether the defendant can exercise its right as a chargee under s. 271(1)(a) NLC to receive rent from the tenant of the charged land, Century Total Logistics Sdn Bhd (tenant). This question depends on the meaning to be given to s. 270(1)(a) NLC; and

(e) whether this suit is a duplicity and/or an abuse of court process by the plaintiff in view of the first suit which is now pending in the Federal Court.

Background

[3] The plaintiff is a wholly owned subsidiary of Swee Joo Bhd (SJB).

[4] The plaintiff is a related company to the following companies which are all subsidiaries of SJB:

(a) Asia Bulkers Sdn Bhd (ABSB);

(b) Masmah Sdn Bhd (MSB);

(c) Johan Shipping Sdn Bhd (JSSB); and

(d) Asia Depot Sdn Bhd (ADSB).

ABSB, MSB, JSSB and ADSB will be collectively referred in this judgment as "related companies".

[5] The defendant has granted various banking facilities to the plaintiff (banking facilities). To secure the plaintiff's repayment of the banking facilities, among others, the plaintiff registered three NLC charges in the defendant's name over three pieces of land belonging to the plaintiff (plaintiff's three lots), namely:

(a) land held under HS(D) 67513, PT No. 64233, Mukim Klang, District of Klang, State of Selangor (Lot No. 28);

(b) land held under HS(D) 67512, PT No. 64232, Mukim Klang, District of Klang, State of Selangor (Lot No. 28A); and

(c) land held under HS(D) 116409, PT No. 236, Bandar Sultan Sulaiman, District of Klang, State of Selangor (Lot No. 31). In this judgment, I will refer the NLC charge over Lot No. 31 as the "charge".

[6] To resolve the related companies' debts:

(a) the plaintiff;

(b) the defendant; and

(c) the related companies

- entered into a "restructure and reschedule arrangement" (R&R arrangement). The R&R arrangement is contained in four letters, all dated 22 October 2010, from the defendant to each of the related companies (defendant's four letters dated 22 October 2010). The plaintiff has accepted the defendant's four letters dated 22 October 2010 by signing all these four documents.

[7] The defendant issued a letter dated 14 October 2010 (defendant's letter dated 14 October 2010) stating the terms for the plaintiff's "redemption" of Lot No. 28A. I have discussed earlier in a judgment regarding the plaintiff's application for an interlocutory injunction (court encl. no. 5) that it is not appropriate under NLC to use the term "redemption" of a registered charge - please see *Jambatan Merah Sdn Bhd v. Public Bank Bhd* [2014] 1 LNS 1657; [2015] AMEJ 212 [Jambatan Merah (No 1)].

[8] The defendant issued a second letter dated 25 October 2010 to the plaintiff (defendant's letter dated 25 October 2010) stating the terms for the plaintiff's "redemption" of the plaintiff's three lots. The plaintiff and the related companies accepted the defendant's letter dated 25 October 2010.

[9] The plaintiff managed to "redeem" Lot Nos. 28 and 28A for a total sum of RM8,533,000.

[10] After the "redemption" of Lot Nos. 28 and 28A, the defendant claimed that the plaintiff was still indebted to the defendant in respect of the credit facilities in the sum of RM1,259,433.88 as at 30 September 2012 but this was disputed by the plaintiff. The plaintiff initially alleged that the plaintiff's indebtedness to the defendant under the banking facilities had been fully settled after the "redemption" of Lot Nos. 28 and 28A. In this suit, the plaintiff has seemingly changed its stand.

[11] The plaintiff is wound up by an order of the Kuala Lumpur High Court (winding up court) on 19 September 2011 and the official receiver (OR) has been appointed as the plaintiff's liquidator (liquidator). On 25 October 2011, the winding up court appointed Dato' Narendra Kumar Jasani a/l Chunilal Rugnath (Dato' Narendra) as the liquidator in place of the OR.

[12] On 22 August 2012, the winding up court granted, among others, leave to the liquidator to "enter into a license/tenancy/lease agreement" in respect of Lot No. 31 for the purpose of the plaintiff's liquidation (winding up court's leave for liquidator to let out Lot No. 31).

First Suit

[13] On 7 September 2012, the plaintiff filed the first suit (Kuala Lumpur High Court Suit No. 22NCC-1356-09-2012) against the defendant claiming for, among others:

(a) a declaration that no R&R arrangement under s. 176 of the Companies Act 1965 (CA) existed between the plaintiff, related companies and the defendant;

(b) a declaration that the banking facilities had been fully settled by the plaintiff; and

(c) an order to direct the defendant to deliver to the plaintiff within seven days from the date of service of the order:

(i) the issue document of title of Lot No. 31 (IDT); and

(ii) a duly executed and registrable instrument of discharge of the charge.

[14] Pursuant to the winding up court's leave for liquidator to let out Lot No. 31, the liquidator let out Lot No. 31 to the tenant by way of a tenancy agreement dated 7 March 2013.

[15] The defendant's solicitors sent two letters dated 22 May 2013 to the tenant:

(a) the first letter (defendant's first letter dated 22 May 2013) stated, among others, as follows:

> *4. We are instructed by (Defendant) to inform you that pursuant to agreements between (Defendant) and (Plaintiff), the (Plaintiff) shall not lease or let out (Lot No. 31) without the prior written consent of (Defendant).*
>
> (emphasis added); and

(b) the second letter enclosed a "notice of entry into possession: by receiving rent" (first Form 16J) under the NLC. The first Form 16J gave notice to the tenant that the defendant had exercised its powers under s. 271 NLC to enter into possession of Lot No. 31 by receiving rent from the tenant.

[16] The High Court allowed the first suit on 14 November 2013 (High Court's decision in first suit). The High Court's decision in first suit was however reversed by the Court of Appeal on 25 June 2014 (Court of Appeal's decision in first suit). The plaintiff has applied to the Federal Court for leave to appeal against the Court of Appeal's decision in first suit (Federal Court application) and the Federal Court is application is still pending.

[17] On 9 July 2014, the plaintiff's solicitors requested from the defendant's solicitors for a "redemption" statement of Lot No. 31 (plaintiff's first request dated 9 July 2014). By way of a letter dated 27 November 2014, the plaintiff's solicitors made a second request from the defendant's solicitors for a "redemption" statement of Lot No. 31 (plaintiff's second request dated 27 November 2014). There is no reply from the defendant's solicitors to the plaintiff's first request dated 9 July 2014 and the plaintiff's second request dated 27 November 2014.

[18] On 3 September 2014, the defendant's solicitors sent a letter to the plaintiff's solicitors (defendant's letter dated 3 September 2014) which stated, among others, as follows:

> *4. We are instructed by (Defendant) to inform you that pursuant to agreements between (Plaintiff) and (Defendant), (Plaintiff) shall not lease or let out (Lot No. 31) without the prior written consent of (Defendant). ...*
>
> ...
>
> *7. In view of the (Court of Appeal's Decision in first Suit) and the breach of the agreements between (Plaintiff) and (Defendant) in respect of the letting of (Lot No. 31), we hereby demand that all rents received by (Plaintiff) in the course of the corresponding tenancy period, that were paid to (Plaintiff) by all previous or current tenants of (Lot No. 31) ..., be paid to (Defendant) within fourteen (14) days hereof, failing which our client shall take steps for recovery of the same including but not limited to civil proceedings, without further reference to you and (Plaintiff).*
>
> (emphasis added).

[19] The defendant issued a second Form 16J dated 3 September 2014 to the tenant (second Form J). The 2nd Form J stated, among others:

> .... And **whereas the [Plaintiff] is in breach of the agreements in the Charge**.
>
> Now, [Defendant], Chargee under the Charge hereby give notice that, in exercise of the powers conferred by section 271 [NLC], [Defendant is] entering into possession of [Lot No. 31] by receiving the rents due thereon.
>
> (emphasis added).

This Suit

[20] The plaintiff filed this suit and prayed for, among others, the following relief:

(a) a declaration that the plaintiff is entitled to "redeem" Lot No. 31 after paying RM1,259,433.88 as at 30 September 2012 with interest at the rate of 3.5% above the defendant's base lending rate from 30 September 2012 to date of full payment;

(b) an order directing the defendant to issue a current "redemption" statement for the "redemption" of Lot No. 31 based on the calculation in the above prayer in para. (a);

(c) an order directing the defendant to deliver to the plaintiff:

(i) a duly executed instrument of discharge of charge; and

(ii) IDT

- within three months or any other period as this court directs from the date of the issue of the defendant's "redemption" statement; and

(d) an injunction to restrain the defendant from exercising any right under s. 271 NLC.

[21] At the trial of this suit:

(a) Dato' Narendra is the only witness for the plaintiff; and

(b) Mr Chan Kok Kwai, the General Manager for the defendant's "credit administration and supervision division" (SD1), testified for the defendant.

[22] Dato' Narendra's evidence is as follows:

(a) the liquidator is only prepared to pay the defendant "such amounts necessary to cause and secure the release and redemption" of Lot No. 31. This liquidator's position has been conveyed to the defendant by way of the liquidator's letter dated 23 February 2012;

(b) the liquidator claims that the sale proceeds from Lot Nos. 28 and 28A amounting to RM5,413,000 (alleged sum) have been "wrongly" utilised by the defendant to settle the related companies' debts. The first suit has been filed to, among others, recover the alleged sum from the defendant;

(c) in para. 34 of the defendant's defence filed in the first suit, the defendant has pleaded as follows:

> … The Plaintiff is indebted to the Defendant in the sum of RM1,259,433.88 as at 30 September 2012 with interest at 3.5% above the Defendant's Base Lending Rate from 30 September 2012 to date of full payment.

(Para. 34 [defence (first Suit)]);

(d) the above contents of para. 34 [defence (first suit)] have been repeated in para. 13 of the agreed facts filed in the first suit (para. 13 (agreed facts (first suit)]). As such, the liquidator avers that the defendant cannot claim more than what the defendant had "admitted" in para. 34 [defence (first suit)] and para. 13 [agreed facts (first suit)];

(e) the liquidator avers that the indebtedness sum of RM13 million (claimed by the defendant) wrongfully includes the related companies' debts. The liquidator claims that the indebtedness should only amount to RM8,859,433.88 which consists of:

(i) RM1,259,433.88 - as admitted by the defendant in para. 34 [defence (first suit)] and para. 13 [agreed facts (first suit)]; and

(ii) RM7,600,000 - the sum due from the plaintiff to the defendant as secured by the charge over Lot No. 31; and

(f) the liquidator let out Lot No. 31 to the tenant pursuant to the winding up court's leave for liquidator to let out Lot No. 31. The liquidator alleges that the defendant cannot exercise its rights as chargee of Lot No. 31 under s. 271 of the NLC because Lot No. 31 is held under a "qualified title" (QT).

[23] SD1's testimony is as follows:

(a) the defendant has granted banking facilities to the plaintiff totalling RM13,350,000;

(b) in October 2010, the related companies and plaintiff owed around RM157.6 million to the defendant;

(c) the related companies and plaintiff agreed with the defendant in respect of the R&R arrangement by way of the defendant's four letters dated 22 October 2010. The R&R arrangement was to assist and resolve the related companies' debts. It was part of the R&R arrangement that the sale proceeds of numerous pieces of land owned by the related companies (related companies' charged land) and plaintiff's three lots were to be utilised at the defendant's discretion so as to settle the related companies' debts;

(d) a "separate redemption arrangement" between the plaintiff and defendant was agreed by way of the defendant's letters dated 14 October 2010 and 25 October 2010 (plaintiff's separate arrangement). According to the plaintiff's separate arrangement, the plaintiff agreed for the sale proceeds of the related companies' charged land and plaintiff's three lots to be utilised at the defendant's discretion so as to pay the related companies' debts and plaintiff's indebtedness to the defendant. The related companies have also agreed to the plaintiff's separate arrangement;

(e) a total sum of RM8,533,000 was used to "redeem" Lot Nos. 28 and 28A (redemption sum for Lot Nos. 28 and 28A) as well as to settle partially the indebtedness of the plaintiff and related companies to the defendant. After utilising the redemption sum for Lot Nos. 28 and 28A, the plaintiff still owed RM1,259,433.88 to the defendant as of 30 September 2012;

(f) the defendant disagrees with the plaintiff that the plaintiff is entitled to "redeem" Lot No. 31 at RM1,259,433.88 as of 30 September 2012 because the plaintiff has agreed by way of both the R&R arrangement and the plaintiff's separate arrangement that the "redemption" sum for Lot No. 31 shall be RM10 million;

(g) the defendant contends that in the liquidator's letters dated 23 February 2012 and 29 February 2012 (liquidator's letters dated 23 February 2012 and 29 February 2012), the liquidator has agreed to the following "redemption" sum for Lot No. 31:

(i) RM13 million "redemption" sum; or

(ii) the full sale and purchase price of Lot No. 31;

(h) the "redemption" sum for Lot No. 31 is:

(i) secured by the charge which is an "open all monies charge" and by virtue of cls. 6 and 46 of the charge annexure (cls. 6 and 46);

(ii) provided in the "cross-consolidation" clause in the R&R arrangement. The Court of Appeal's decision in first suit has affirmed the R&R arrangement;

(iii) stated in the plaintiff's separate arrangement which has been affirmed by the Court of Appeal's decision in first suit; and

(iv) provided in cls. 18 and 35 of the "facilities agreement" dated 9 December 2008 between the plaintiff and defendant (FA);

(i) the plaintiff's position in this action "blatantly conflicts" with its position taken in:

(i) the first suit;

(ii) the defendant's appeal to the Court of Appeal against the High Court's decision in first suit; and

(iii) the Federal Court application;

(j) the defendant gave a detailed calculation on how the defendant computed the RM13 million "redemption" sum (please see defence exhibits, D1 and D2);

(k) prior to March 2013, the defendant did not know that the liquidator had let out Lot No. 31. Under the charge, the plaintiff cannot let out Lot No. 31 without the defendant's prior written consent. As such, the plaintiff has breached the charge by letting out Lot No. 31 without the defendant's prior written consent;

(l) the defendant was not aware of the winding up court's leave for liquidator to let out Lot No. 31 as the Defendant was not a party to that order. The winding up court's leave for liquidator to let out Lot No. 31 did not provide for the plaintiff to let out Lot No. 31 without the defendant's prior written consent;

(m) Lot No. 31 is held under a "registry title" (RT) which entitles the defendant to issue Form 16J under the NLC; and

(n) the plaintiff has not suffered any loss or damage in this case due to the defendant.

Terminology

[24] As explained in *Jambatan Merah (No 1)*, at paras. 25-27, our NLC embodies the Torrens system of registration of titles and interest in land. Accordingly, I will use the NLC term "discharge" rather than the common law term "redemption".

Is Plaintiff Entitled To Discharge Statement Under Charge

[25] I cannot find any Malaysian case which has decided whether a NLC chargee is obliged under a charge to provide a discharge statement upon the chargor's request. Nor am I able to unearth any case from Australia and New Zealand (which apply the Torrens land law system) on this point. This case is therefore one of first impression.

[26] Sections 243, 249(1) and 266 NLC provide as follows:

Effect of charges

243. Every charge created under this Act shall take effect upon registration so as to render the land or lease in question liable as security in accordance with the provisions thereof, express or implied.

Agreements by chargor implied in all charges

249(1) In every charge created under this Act, there shall be implied on the part of the chargor:

(a) an agreement that he will comply with the provisions thereof as to payment of the sum or sums thereby secured, and with any provision for the payment of interest thereon, if any; and

(b) an additional agreement in the terms set out in subsection (2) or (3), according as the subject-matter of the charge is land or a lease.

Right of chargor to tender payment at any time before sale

266(1) *Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in sub-section (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.*

(2) The amounts referred to in sub-section (1) are:

(a) *the amount shown in the order as due to the chargee at the date on which the order was made;*

(b) such further amounts (if any) as have fallen due under the charge between the date of the order and the date of the tender; and

(c) an amount sufficient to cover all expenses incurred in connection with the making, or carrying into effect, of the order.

(3) Where any order for sale ceases to have effect by virtue of this section, the Registrar of the Court or, as the case may be, Land Administrator shall give notice thereof to every chargee of the land or lease in question.

(emphasis added).

[27] It is clear that under ss. 243 and 249 NLC, the nature and extent of the rights and obligations of both the plaintiff and defendant in this case are dependent on the terms and conditions stated in the charge and charge annexure. It is trite law that construction of contracts is a question of law to be decided by the court and not by witnesses through their oral evidence - please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96, at 103-104.

[28] The leading case on ss. 243 and 266 NLC is the Supreme Court's judgment in *Malayan United Finance Bhd v. Tan Lay Soon* [1991] 2 CLJ 899; [1991] 1 CLJ (Rep) 292; [1991] 1 MLJ 504 (*Tan Lay Soon*). In *Tan Lay Soon*, at p. 298 (CLJ); p. 507 (MLJ), Jemuri Serjan CJ (Borneo) held as follows:

Under the [NLC] the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it renders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s. 243). Under s. 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. *There is no statutory provision for the discharge of the charge by the chargor but his*

right and that of a borrower to do so is embodied in the provisions of the charge itself. See cl. 3(ii) of the annexure to the charge and s. 249(1) [NLC]. *However, under s. 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the Registrar of the court or the Collector and the amount sufficient to cover all expenses.*

(emphasis added).

[29] Based on *Tan Lay Soon*, by virtue of s. 243 NLC, upon the registration of the charge under NLC, Lot No. 31 is security for the repayment of the plaintiff's indebtedness to the defendant as provided in charge, including the charge annexure.

[30] Clauses 46 and 62 of the charge annexure confer a right on the plaintiff to discharge the charge. Clauses 46 and 62 state as follows:

46. CONSOLIDATION

Section 245 [NLC] ... to which [Lot No. 31] is governed by which has the effect of restricting the right of consolidation, shall not apply to this Charge. In addition to and without prejudice to any other right of consolidation, it is hereby declared that [Lot No. 31] shall not be redeemed save and except on payment of not only all moneys secured hereby but also all moneys whatsoever and howsoever owing or payable or due from the [Plaintiff] and/or the Borrower to the [Defendant] ... under any account whether as borrower, guarantor, assignor, lessee, pledgor, chargor or otherwise with the [Defendant], and of all the Indebtedness and also monies secured by any other mortgage, charge, lien, pledge, encumbrance, or any other security whatsoever created by the [Plaintiff] ...

Without prejudice to any other remedy which the [Defendant] may have, the [Defendant] may at any time and without notice to the [Plaintiff] and/or the Borrower, combine or consolidate all or any of the accounts of the Borrower and/or the [Plaintiff] ... wheresoever situate with any liabilities of the [Plaintiff] and/or the Borrower under any other agreement or contract with the [Defendant] ...

62. DISCHARGE OF CHARGE

Subject to the rights of the [Defendant] herein, upon payment to the [Defendant] of the Indebtedness together with all interests and other whatsoever moneys payable by the [Plaintiff] under any account with the [Defendant] whether or not and howsoever secured, the [Plaintiff] shall be entitled to obtain a discharge of this Charge provided that the Memorandum of Discharge of Charge shall be prepared by the solicitors appointed by the Bank and duly executed by the Bank and all costs incurred in respect thereof (including the cost of solicitors acting for the Bank) shall be borne and paid by the Chargor and/or the Borrower.

(emphasis added).

[31] I am of the view that if cls. 46 and 62 confer a right to discharge the charge on the plaintiff, by necessary implication, cls. 46 and 62:

(a) entitle the plaintiff to be given a discharge statement by the defendant upon such a request by the plaintiff to the defendant;

(b) oblige the defendant to provide a discharge statement to the plaintiff after the defendant has received such a request from the plaintiff; and

(c) the discharge statement should contain a precise sum of money for the plaintiff to discharge the charge on a certain date in the future with the manner and details of computation (this is because the plaintiff is entitled to query and challenge the sum stated by the defendant in the discharge statement)

(necessary implication of cls. 46 and 62).

[32] Additionally or alternatively, the plaintiff's right to be given a discharge statement by the defendant is implied in the charge (implied term to provide discharge statement). It is trite law that a term may be implied in a contract if two tests have been cumulatively fulfilled as laid down by Peh Swee Chin FCJ in the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503; [1998] 3 MLJ 151, at 531-533 (CLJ); 169-170 (MLJ), as follows:

> Implied terms are of three types. *The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contact.* …
>
> *Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in Shirlaw v. Southern Foundries (1926) Ltd [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".*
>
> *The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p 137, that in regard to an implied term, '… it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. *Business efficacy in my opinion, simply means the desired result of the business in question.* …
>
> *Both tests in my opinion must be satisfied before a court infers an implied term.* Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p. 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

A The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract.

(emphasis added).

B **[33]** In accordance with *Sababumi (Sandakan) Sdn Bhd*, at pp. 169-170 (MLJ), I find that there is an implied term to provide discharge statement. This is because both the subjective test of officious bystander and the objective test of business efficacy, have been satisfied in respect of the implied term to provide discharge statement:

C (a) if an "officious bystander" is asked whether a chargor of land is entitled to a discharge statement under the charge from the chargee, the "officious bystander" would have answered "of course"; and

(b) it is necessary to give business efficacy to the secured loan transaction between the chargor and chargee as embodied in the charge, for the D chargee to be obliged under the charge to provide a discharge statement to the chargor upon the chargor's request. If otherwise, how will the chargor be able to exercise the right to discharge the charge.

[34] The above findings regarding:

E (a) Necessary implication of cls. 46 and 62; and

(b) Implied term to provide discharge statement are supported by s. 266(1), (2)(a), (b) and (c) NLC as follows:

F (i) if there is a default in respect of the secured loan obligations under a charge (default) and the chargee has obtained an order for sale of the charged land (by the High Court under s. 256(3) NLC or by the Land Administrator under s. 263(1) NLC) (sale order), s. 266(1) NLC provides a statutory right to the chargor to discharge the charge before the conclusion of sale (before the fall of the auctioneer's G hammer at the public auction of the charged land) by paying the chargee's indebtedness as computed in the manner provided in s. 266(2)(a), (b) and (c) NLC; and

(ii) if a chargee is duty bound to provide a discharge statement (to be computed in accordance with s. 266(2)(a), (b) and (c) NLC) to the H chargor after a default and a sale order, a *fortiori*, before a default and before the making of a sale order, the chargor should be entitled to a discharge statement from the chargee.

[35] Before I conclude on this issue, I also accept the submission by the plaintiff's learned counsel that there is a pragmatic reason to support the duty I of a chargee to supply a discharge statement to the chargor under the charge. This is because only the chargee and not the chargor, will know the exact amount to be paid by the chargor to discharge the charge.

Has Defendant Provided Discharge Statement As Requested By Plaintiff

[36] The defendant contends that the defendant has given the discharge statement by way of the following letters:

(a) the defendant's four letters dated 22 October 2010;

(b) the defendant's letter dated 25 October 2010; and

(c) defendant letter dated 25 March 2011 to JSSB (defendant's letter dated 25 March 2011).

[37] The defendant further submits that the defendant has informed the liquidator of the "redemption" sum for Lot No. 31 by way of the defendant's letters dated 16 February 2012 and 28 February 2012 (defendant's letters dated 16 February 2012 and 28 February 2012). Furthermore, according to the defendant, the liquidator has acknowledged that the liquidator knew of the "redemption" sum for Lot No. 31 by way of the liquidator's letters dated 23 February 2012 and 29 February 2012.

[38] I am satisfied on a balance of probabilities that the defendant's breach has been committed when the defendant's solicitors did not provide a discharge statement as requested twice by the plaintiff by way of the plaintiff's first request dated 9 July 2014 and the plaintiff's second request dated 27 November 2014. My reasons are as follows:

(a) the defendant's solicitors did not reply at all to the plaintiff's first request dated 9 July 2014 and the plaintiff's second request dated 27 November 2014; and

(b) the defendant cannot rely on the defendant's four letters dated 22 October 2010 as well as the defendant's letters dated 25 October 2010, 25 March 2011, 16 February 2012 and 28 February 2012. Nor can the defendant assert that liquidator has already known of the "redemption" sum for Lot No. 31 by way of the liquidator's letters dated 23 February 2012 and 29 February 2012. I decide as such because:

(i) for reasons which I will explain later in this judgment, upon the plaintiff's winding up on 19 September 2011 and the defendant's failure to realise its security in Lot No. 31 within six months from the date of the plaintiff's winding up (six month period), the defendant is not entitled to any interest after the plaintiff's winding up (effect of plaintiff's winding up). The defendant's four letters dated 22 October 2010 as well as the defendant's letters dated 25 October 2010 and 25 March 2011 did not address the Effect of plaintiff's winding up for the simple reason that these letters were sent before the plaintiff's winding up. The defendant's letters dated 16 February 2012 and 28 February 2012 did not discuss about the effect of plaintiff's winding up as the six month period had yet to

A expire at the time of the sending of those letters. As such, after the six month period, the plaintiff is entitled to know the exact amount of indebtedness on a future date by way of a discharge statement;

(ii) if it were true that the defendant did rely on the defendant's four letters dated 22 October 2010 as well as the defendant's letters dated 25 October 2010, 25 March 2011, 16 February 2012 and 28 February 2012, the defendant's solicitors could have easily replied to the plaintiff's first request dated 9 July 2014 and the plaintiff's second request dated 27 November 2014 by stating that the defendant would rely on its earlier letters. However, there was no reply at all from the defendant's solicitors to the plaintiff's first request dated 9 July 2014 and the plaintiff's second request dated 27 November 2014; and

(iii) the defendant' letter dated 25 March 2011 has been sent to JSSB and not the plaintiff.

[39] The Financial Services Act 2013 (FSA) has come into force on 30 June 2013. Part VIII FSA (ss. 121 to 139 FSA) is entitled "business conduct and consumer protection". The FSA does not apply to this case but I wish to highlight s. 123(1) and (2)(a) FSA which provide for:

(a) Bank Negara Malaysia's (BNM) power to specify standards on business conduct to a "financial service provider" (defined in s. 121 FSA) for the purposes of ensuring that a financial service provider is fair, responsible and professional when dealing with "financial consumers" (defined in s. 121 FSA); and

(b) BNM may specify standards concerning "disclosure requirements" which include the "provision of information to financial consumers that is accurate, clear, timely and not misleading".

[40] In the interest of banking consumers in particular and in the overall interest of the banking industry, banks should provide "accurate, clear, timely and not misleading" discharge statements upon requests by chargors. It is neither prudent nor acceptable for any bank not to reply to a letter from its customer, as in this case.

[41] The defendant's breach is continuous as until the date of this court's oral decision on 5 June 2015, the defendant has not provided a discharge statement to the plaintiff. I will discuss the effect of the continuous defendant's breach in respect of whether the defendant is entitled to exercise its rights under s. 271 NLC or otherwise.

Has Plaintiff Proved Any Loss Or Damage Arising From Defendant's Breach

[42] Both the plaintiff and defendant have agreed during pre-trial case management under O. 34 of the Rules of Court 2012 (RC) that the plaintiff's suit would be decided on both liability and quantum after the trial of this case. As such, upon proof of the defendant's breach, the next question for determination is whether the plaintiff is entitled to claim any damages from the defendant in respect of the defendant's breach.

[43] The issue of whether a party may claim for loss and damage arising from an agreement depends on the application of s. 74 of the Contracts Act 1950 (CA (1950)). Section 74 CA (1950) reads as follows:

> Compensation for loss or damage caused by breach of contract
>
> 74(1) *When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> (2) *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
>
> (emphasis added).

[44] It is trite law that the plaintiff bears the legal burden to prove loss and damage as a result of the defendant's breach on a balance of probabilities. In *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569 at 789-791 (CLJ); 575-576 (MLJ), Mohd Dzaiddin SCJ (as he then was) decided as follows in the Supreme Court:

> Therefore, the basic question for our decision here is whether the learned judge was correct in his assessment of damages for loss of profits. That raises the question whether he applied the correct principles of law or the amount was based on an entirely erroneous estimate of the damage. (*Flint v. Lovell* [1934] 1 KB 354 at p 360.)
>
> *In considering the above question, it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s. 74(1) of the Contracts Act 1950, which is the statutory enunciation of Hadley v Baxendale (1854) 9 Ex 341 (Teoh Kee Keong v. Tambun Mining Co Ltd [1968] 1 MLJ 39; Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76, SC). In essence, the section states that the party may recover any loss or damage for any breach which: (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it*. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v. Baxendale*, which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract'. See *Associated Metal Smelters Ltd v. Tham Cheow Toh* [1971] 1 MLJ 271. …

A …

It is trite that the plaintiff must prove the loss although the standard imposed on it is not a high one.

(emphasis added).

B **[45]** The plaintiff has not adduced any evidence in this trial to prove that the plaintiff has suffered any loss or damage due to the defendant's breach. No evidence has been produced in this case that there has been a party who is interested to purchase Lot No. 31 and such a purchase cannot be effected due to the defendant's breach.

C **[46]** Even if the plaintiff has suffered any loss or damage due to the defendant's breach (alleged loss), the plaintiff must prove that the alleged loss is claimable and is not too remote under either one or both the limbs of s. 74(1) CA (1950) as follows:

D (a) the alleged loss "naturally arose in the usual course of things" from the defendant's breach within the meaning of the first limb of s. 74(1) CA (1950); and/or

(b) both the plaintiff and defendant "knew, when they made the contract" that the alleged loss was "likely to result from the breach" of the E defendant's breach as understood in the second limb of s. 74(1) CA (1950).

[47] Even if it is assumed that the plaintiff can prove the alleged loss, I am not satisfied that the alleged loss falls within the ambit of any one or both the limbs in s. 74(1) CA (1950). Accordingly, the plaintiff is not entitled to F any damages in respect of the defendant's breach.

How To Compute Indebtedness

Is Defendant Estopped By Para. 34 [Defence (First Suit)] And Para. 13 [Agreed Facts (First Suit)]

G **[48]** In respect of the sum of indebtedness to discharge the charge, I shall first decide the plaintiff's contention that the defendant is bound to follow the sum stated in its own para. 34 [defence (first suit)] and para. 13 [agreed facts (first suit)]. I am not able to accede to this submission because the Court of Appeal's decision in first suit is in the defendant's favour. In other words, H the defendant is not estopped by its own para. 34 [defence (first suit)] and para. 13 [agreed facts (first suit)]. In any event, the sum of indebtedness is a live issue before me in this case and will be decided as follows.

Can Indebtedness Include Related Companies' Debts

I **[49]** The plaintiff's learned counsel has contended that the indebtedness should not include the related companies' debts for the following grounds:

(a) the R&R arrangement confers contractual rights *in personam* on the defendant against the plaintiff in respect of the related companies' debts. The R&R arrangement does not secure the related companies' debts in

the defendant's favour. In other words, the R&R arrangement does not create secured rights *in rem* in the defendant's favour. As the plaintiff has been wound up, to enforce the contractual rights *in personam* provided in the R&R arrangement, the defendant should file a proof of debt with the liquidator in respect of the related companies' debts;

(b) whether the related companies' debts are secured by the charge in the defendant's favour, depends what is secured within the "four corners" of the charge. According to cl. 62 and the definitions of "indebtedness", "facilities" and "facilities agreement" (all defined in cl. 1 of the charge annexure (cl. 1)], "there must be an account that the plaintiff has with the defendant" so as to secure the sum in the plaintiff's account with the defendant. As the related companies' debts are not in respect of the plaintiff's account with the defendant, the related companies' debts are not secured under the charge so as to be included in the indebtedness;

(c) debts which are not included in the charge, cannot be included for the purpose of discharging the charge. The defendant cites s. 245 NLC as follows:

> Restriction on consolidation
>
> 245. *In the absence of any express provision therein to the contrary,* a person seeking to discharge any charge may do so without making any payment in or towards the discharge of any other charge created by him, or any person through whom he claims, on property other than that comprised in the first-mentioned charge.
>
> (emphasis added);

(d) Clause 46 only allows a "consolidation" of the plaintiff's own debts due to the defendant "under other account or other securities". Clause 46 does not allow a consolidation of debts of third parties such as the related companies' debts. Nor does cl. 46 allow a "cross-consolidation" as provided in the R&R arrangement. A "cross-consolidation" of third parties' debts, such as the related companies' debts, can only be secured by way of registration of a "fresh" charge (I think the plaintiff's learned counsel has in mind a second charge over Lot No. 31);

(e) the related companies' debts were incurred two years after the registration of the charge and should not fall under the charge; and

(f) by virtue of s. 8(2A) of the Bankruptcy Act 1967 (BA) read with s. 4(1) and (2) of the Civil Law Act 1956 (CLA) as construed by the Federal Court's judgment in *Pilecon Realty Sdn Bhd v. Public Bank Bhd & Ors and Other Appeals* [2013] 2 CLJ 893, since the defendant had not realised its security in Lot No. 31 within the six month period, the defendant could not claim for any interest after the date of the plaintiff's winding up.

[50] The charge stated (in Malay, with all grammatical and spelling errors):

Kami, [Plaintiff] ...

tuanpunya tanah ...

Bagi maksud menjamin:

...

(c) pembayaran kepada pemegang gadaian yang tersebut namanya di bawah ini, beserta faedah wang yang dari semasa kesemasa [sic] kena dibayar kepada pemegang gadaian yang tersebut oleh saya/kami dan daripada kira-kira terbuka kami atau kira-kira yang lain, wang yang tersebut di dalam [sic] peruntukan-peruntukan yang dilampirkan disini [sic].

Dengan ini menggadaikan tanah tersebut untuk membayar kepadanya wang yang tersebut itu beserta faedah atasnya [sic] mengikut peruntukan-peruntukan yang dilampirkan disini [sic].

[Paragraph (c) of Charge] (emphasis added).

[51] Besides cls. 46 and 62, the following provisions in the charge annexure are relevant in this case:

1. CONSTRUCTION AND DEFINITION

(a) Except where the context requires, or unless the Charge otherwise provides, all words and expressions defined in the [FA] when used or referred to in this Charge shall have the same meanings as that provided for in the [FA].

(b) Similarly, wherever applicable, the provisions of this Charge shall be interpreted in the same manner as the provisions of the [FA] would be interpreted.

(c) In addition to those words and expressions already defined in the [FA], *the following words and expressions shall, unless the context otherwise requires, have the meaning respectively assigned to them hereunder:*

...

"Indebtedness" means the aggregate of all sums advanced from time to time by the [Defendant] at the request of the [Plaintiff] and/or Borrower pursuant to the Facilities together with Interest thereon *and all other moneys payable by the [Plaintiff] and/or the Borrower to the [Defendant] (whether in respect of principal, interest, commitment fee, costs, expenses or otherwise) and includes all liabilities and obligations whether present or future or actual* or contingent *for the repayment of all moneys by the [Plaintiff]* and/or the Borrower *in respect of or arising from the [FA] now and/or hereafter executed* and this Charge;

3. CHARGE

Pursuant to the Letter(s) of Offer and/or the [FA] and *as security for payment and discharge of the Indebtedness, the [Plaintiff] hereby charges [Lot No. 31] to the [Defendant] by way of a fixed charge upon the terms and conditions hereinafter contained.*

4. COVENANT TO PAY AND IRREVOCABLE AUTHORITY TO RELEASE

4.1 *The [Plaintiff] and the Borrower hereby covenant and agree to forthwith pay to the [Defendant] ON DEMAND the aggregate of the Indebtedness due to the [Defendant] with interest thereon … and together with* commission, discount and all other banking charges and *all costs, charges and other expenses which the [Defendant] may charge or … in preserving any existing security held by the [Defendant] or in enforcing or obtaining payment of such moneys or in paying any expenses or outgoings whatsoever in respect of … in defending or prosecuting or otherwise howsoever taking part in or attending at (whether on a watching brief as observer or otherwise howsoever) any action, enquiry, hearing, suit or other proceedings whatsoever affecting [Lot No. 31] or … and also all other payments and sums hereinafter mentioned or stipulated.*

6. CONTINUING SECURITY

The security created by this Charge … shall be a continuing security for all moneys whatsoever now or at anytime and from time to time hereafter owing to the [Defendant] by the [Plaintiff] …

41. CERTIFICATE OF INDEBTEDNESS

It is hereby agreed that any admission or acknowledgement in writing by the [Plaintiff] and/or the Borrower or by any person authorised on behalf of the [Plaintiff] and/or the Borrower … shall be binding and conclusive evidence against the [Plaintiff] and/or the Borrower for whatever purpose including as being conclusive evidence of the Indebtedness in a court of law.

71. SUPPLEMENTAL TERMS AND CONDITIONS

The terms of this Charge may also from time to time be varied or amended or supplemented by an exchange of letters and shall be effective without the necessity of having to enter into any formal instrument or supplemental document and the relevant provisions of this Charge shall be deemed to have been amended or varied or supplemented accordingly and shall be read and construed as if such amendments or variations or supplements had been incorporated in and had formed part of this instrument at the time of execution hereof. …

(emphasis added).

[52] I am of the view that the related companies' debts are secured under the charge and charge annexure. This decision is premised on the following reasons:

(a) Paragraph (c) of charge secures the payment of money with interest as provided in the charge annexure. I will now turn to the relevant clauses in the charge annexure;

(b) the plaintiff has agreed to bear the related companies' debts by signing the defendant's four letters dated 22 October 2012 (R&R arrangement) and the defendant's letter dated 25 October 2012 (plaintiff's separate arrangement). As such, the related companies' debts fall within the

definition of "indebtedness" in cl. 1(c) (all other moneys payable by the (plaintiff) and/or the borrower to the (defendant) (whether in respect of principal, interest, commitment fee, costs, expenses or otherwise) and includes all liabilities and obligations whether present or future or actual ... for the repayment of all moneys by the (plaintiff) and/or the borrower ... hereafter executed);

(c) as the related companies' debts fall within the meaning of "indebtedness" as defined in cl. 1(c):

(i) the related companies' debts therefore constitute part of the "security for payment and discharge of the indebtedness" within the meaning of cl. 3. Such a security is a "continuing security for all moneys whatsoever now or at anytime and from time to time hereafter owing to the (defendant) by the (plaintiff)" under cl. 6;

(ii) by virtue of cl. 4.1, the plaintiff has covenanted to pay the "indebtedness" which included the related companies' debts; and

(iii) according to cl. 46, Lot No. 31 "shall not be redeemed save and except on payment of not only all moneys secured hereby but also all moneys whatsoever and howsoever owing or payable or due from the (plaintiff) … to the (defendant) ... under any account whether as borrower, guarantor, assignor, lessee, pledgor, chargor or otherwise with the (defendant), and of all the indebtedness";

(d) Clause 46 allows the defendant "at any time and without notice to the (plaintiff) … combine or consolidate all or any of the accounts of … the (plaintiff) ... wheresoever situate with any liabilities of the (plaintiff) … under any other agreement or contract with the (defendant)". The defendant's four letters dated 22 October 2012 and the defendant's letter dated 25 October 2012 which have been agreed by the plaintiff, constitute "any other agreement or contract" with the defendant within the meaning of cl. 46;

(e) Clause 62 makes it clear that the plaintiff can only discharge the charge "upon payment to the (defendant) of the indebtedness" and "other whatsoever moneys payable by the (plaintiff) under any account with the (defendant) whether or not and howsoever secured". The defendant's four letters dated 22 October 2012 and the defendant's letter dated 25 October 2012 which have been agreed by the plaintiff fall within the phrase "other whatsoever moneys payable by the (plaintiff) under any account with the (defendant) whether or not and howsoever secured" in cl. 62;

(f) the defendant's four letters dated 22 October 2012 and the defendant's letter dated 25 October 2012 constitute "(admissions) or (acknowledgements in writing)" by the plaintiff which "shall be binding and conclusive evidence" against the plaintiff "for whatever purpose" under cl. 41; and

(g) the defendant's four letters dated 22 October 2012 and the defendant's letter dated 25 October 2012 vary, amend and/or supplement the charge as understood in cl. 71 (the charge may be "varied or amended or supplemented by an exchange of letters and shall be effective without the necessity of having to enter into any formal instrument or supplemental document and the relevant provisions of this charge shall be deemed to have been amended or varied or supplemented accordingly and shall be read and construed as if such amendments or variations or supplements had been incorporated in and had formed part of this instrument at the time of execution hereof").

[53] In response to the plaintiff's contentions:

(a) by reason of the definition of "indebtedness" [cl. 1(c)], cls. 3, 4.1, 6, 41, 46, 62 and 71, the defendant's four letters dated 22 October 2012 (R&R arrangement) and the defendant's letter dated 25 October 2012 (plaintiff's separate arrangement) have been secured within the "four corners" of the charge (please see the above para. 52);

(b) I am unable to accept the plaintiff's submission that only money due to the defendant from the plaintiff's own account with the defendant, can be secured under the charge. The charge does not confine "indebtedness" to what was owed to the defendant in the plaintiff's own account with the defendant. To the contrary, the following clauses in the charge annexure clearly provide that "indebtedness" may include sums in the accounts of third parties (such as the related companies) as agreed by the plaintiff:

(i) Clause 46 provides the plaintiff can only discharge the charge "save and except on payment of not only all moneys secured hereby but also *all moneys whatsoever and howsoever owing or payable or due from the (plaintiff) and/or the borrower to the (defendant) ... under any account* whether as borrower, guarantor, assignor, lessee, pledgor, chargor or otherwise with the (defendant)" (emphasis added); and

(ii) Clause 62 states that the plaintiff may discharge the charge "upon payment to the (defendant) of the indebtedness together with all interests and other whatsoever moneys payable by the (plaintiff) *under any account with the [defendant]"* (emphasis added);

(c) section 245 NLC does not apply to the charge as is clear from cl. 46;

(d) the phrase "all moneys whatsoever and howsoever owing or payable or due from the (plaintiff)" in cl. 46 is sufficiently wide to allow a cross-consolidation of third parties debts, such as the related companies' debts. Any other construction will render redundant such a phrase in cl. 46; and

(e) if the related companies' debts fall within the meaning of "indebtedness" in cl. 1(c) and the wording in cls. 41, 46, 62 and 71, it is immaterial that the R&R arrangement and the plaintiff's separate arrangement have been agreed by the plaintiff two years after the registration of the charge.

Effect Of Plaintiff's Winding Up

[54] In deciding the effect of plaintiff's winding up on the amount of indebtedness, the following statutory provisions are relevant:

(a) Section 291 Companies Act 1965:

Proof of debts

291(1) *In every winding up, subject in the case of insolvent companies to the application in accordance with this Act of the law relating to bankruptcy*, all debts payable on a contingency and all claims against the company present or future, certain or contingent, ascertained or sounding only in damages shall be admissible to proof against the company, a just estimate being made so far as possible of the value of such debts or claims as are subject to any contingency or sound only in damages or for some other reason do not bear a certain value.

(2) *Subject to section 292, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons*, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

(emphasis added);

(b) Section 4 CLA:

Administration of insolvent estates, and *winding up of companies*

4(1) In the administration by any Court of the assets of any deceased person whose estate proves to be insufficient for the payment in full of his debts and liabilities, and *in the winding up of any company under any law from time to time in force relating to companies, whose assets prove to be insufficient for the payment of its debts and liabilities, and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as are in force for the time being, under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt*.

(2) *All persons who, in any such case, would be entitled to prove for and receive dividends,* out of the estate of any such deceased person, or *out of the assets of any such company,* may come in under the decree or order for the administration of the estate, *or under the winding up of the company, and make such claims against the same as they may respectively be entitled to by virtue of this Act.*

(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

(emphasis added); and

(c) Section 8 BA:

Effect of receiving order

8(1) On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

(2) This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed - nor shall it operate to prejudice the right of any person to receive any payment under or by virtue of section 31 of the Employment Act 1955 of the States of Peninsular Malaysia or any corresponding provisions in Sabah and Sarawak.

(2A) *Notwithstanding subsection (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realise his security within six months from the date of the receiving order.*

(3) On a receiving order being made against a debtor he shall, within twenty-four hours after such order has been served upon him file an affidavit in the office of the Director General of Insolvency, containing a true and correct statement of the names and residences of all the partners, if any, in his business and of his principal assets and liabilities. Such statement shall for the purposes of this Act be deemed to be part of the debtor's statement of his affairs referred to in section 16.

(4) On such order as aforesaid being made against a debtor the Director General of Insolvency shall forthwith take possession of all books of account and other papers and documents in the possession, custody or control of the debtor relating to his property or affairs, and may take into his possession all or any deeds, books, documents and other property of the debtor.

(emphasis added).

[55] In *Pilecon Realty Sdn Bhd*, at pp. 898, 904 and 906-909, Zaleha Zahari FCJ decided as follows in the Federal Court:

> [1] *Public Bank Berhad ("the bank") obtained leave on 9 November 2011 to appeal to the Federal Court against the whole of the decision of the Court of Appeal dated 13 September 2011 on the following questions of law*:
>
> (a) *Whether the statutory right of a chargee under the National Land Code to rely on his security to obtain full satisfaction of the indebtedness owed to him, is restricted by s. 8(2A) of the Bankruptcy Act 1967* where:
>
> (i) *such security is provided by a company which is later wound up under the provisions of the Companies Act 1965*; and
>
> (ii) *the security was not realised within six months of the winding up order*;
>
> (b) *Does s. 8(2A) of the Bankruptcy Act 1967 apply in a company liquidation situation where the secured creditor relies on his security for full satisfaction*?
>
> [2] *Pilecon Realty Sdn Bhd ("Pilecon Realty") had also, on the same date, 9 November 2011, obtained leave to cross appeal to the Federal Court against part of the decision of the Court of Appeal dated 13 September 2011 on the following question of law*:
>
> *Whether a secured creditor is entitled to any interest in respect of its debts after the making of a winding up order if it does not realise its security within 6 months from the date of the winding up order.*
>
> [3] *The issue for determination in this case is, what is the interpretation to be given to s. 8(2A) of the Bankruptcy Act 1967* (subsequently referred to as "the BA").
>
> …
>
> [32] *What is in issue in this case is, whether the amendment to s. 8 of the BA, the insertion of a new sub-s. (2A) with effect from 17 July 1992, is to be limited in its application to secured creditors in a bankruptcy situation or whether it is also applicable to secured creditors in a winding up situation*?
>
> …
>
> [38] *When the legislature amended the BA to include sub-s. (2A) into s. 8, it was fully aware of the effect of the provisions of the law that was then in force. Based on the pre-amended provisions Malaysian courts had consistently taken the view that a secured creditor who choose not to prove in the bankruptcy of the debtor should not be deprived of the interest which the contract allows.*
>
> [39] *The legislature clearly was fully cognizant of the effect of the provisions of the prevailing laws prior to the insertion of sub-s. (2A) into s. 8 and had deliberately set out to change the law. The legislature however had not deemed it fit to change the other referral and related provisions as submitted by the appellant's counsel.*
>
> [40] *In our considered opinion the mischief and rationale for the insertion of sub-s. (2A) into s. 8 of the BA, as evident from the explanation given by the Minister in moving the amendments to the BA for its second reading in the Dewan Rakyat on 14 May 1992, was, by reason of the law as it then stood, enabled some secured creditors to take an inordinately long time to realise the*

property resulting in the debtor having to continue to bear interest until the sale is completed. This was to be considered to be unfair to unsecured creditors and to the debtors. The speech of the Honourable Minister in moving the amendment to the BA in respect of s. 8 was as follows:

> … Seterusnya pindaan adalah juga dicadangkan dibuat kepada Seksyen 8 bagi memperuntukkan bahawa tiada apa-apa bunga boleh dibayar kepada pemiutang bercagar jika sekiranya pemiutang tersebut gagal menghasilkan cagarannya dalam tempoh 6 bulan dari tarikh perintah penerimaan dibuat. Rasionalnya ialah pada amalan biasa dan berdasarkan peruntukan yang sedia ada, didapati segolongan pemiutang bercagar mengambil masa yang terlalu lama untuk menghasilkan harta tersebut. Manakala bunga yang perlu dibayar oleh penghutang berterusan sehinggalah jualan dilaksanakan. Perbuatan sedemikian adalah tidak adil kepada pemiutang yang tidak bercagar dan juga kepada penghutang.

[41] *Thus, although a secured creditor under s. 8(2) of the BA was free to deal with his security, with the insertion of the sub-s. (2A) into s. 8, the chargee must realise their security promptly within six months of the receiving order failing which the chargee cannot claim any interest*.

[42] *Decisions of the courts prior to sub-s. (2A) being introduced into s. 8 of the BA, or does not involve any issue arising from s. 8(2A), would accordingly be of little, if any, assistance to us, in making a considered decision in this case. The duty of the courts is to make a construction to cure the mischief and advance the remedy. It is not our duty either to add or to take away the meaning of the words of a statute unless there are good reasons for thinking that the legislature had intended to limit its operation*.

[43] *For the courts to limit the application of a certain provision when the legislature had failed to express such an intention would be to usurp the functions of the legislature which is not within the competence of the courts to do. The duty of the courts is to give full effect to the language of the law. The function of the courts is to construe the language of the referral and related provisions as they stand, to give effect to the purpose of enacting the provision, and the mischief which existed which the legislature sought to eliminate*.

[44] *Section 4(1) and (2) of the Civil Law Act 1956 is the provision relating to the administration of insolvent estates and winding up of companies. …*

[45] *The provisions of the BA in relation to the debts of a bankrupt are clearly applicable to an insolvent company by virtue of ss. 291(1) and 291(2) of the Companies Act*.

[46] *Section 8, and in particular, sub-s. (2A) of the BA, are clear and unambiguous. In the absence of an express provision limiting its application, there is no reason to limit its application only against a bankrupt and not to a wound up debtor. We are in agreement with the Court of Appeal that upon a true construction of s. 4(1) and (2) of the Civil Law Act 1956, s. 291(1) and (2) of the Companies Act, s. 8(2A) of the BA is equally applicable to a secured creditor in relation to a winding up situation.*

A [47] *The answers to Questions 1 and 2 posed by the appellant are therefore in the affirmative.*

[48] On the issue of a secured creditor's right to interest being limited up to a period of only six months as found by the Court of Appeal, the facts of this case show that the bank had filed the civil suit against Transbay in 2001, obtained judgment on 22 August 2003; filed a foreclosure action of the charged property way back in 2002 and obtained an order for sale on 7 October 2003; filed an application to wind up Transbay in 2005 and obtained a winding up order on 27 January 2006. The bank however only managed to sell the said property by way of a tender exercise on 22 July 2008.

C [49] *Based on our reading of s. 8(2A), a secured creditor is given a timeline of six months to sell the charged property failing which they are not entitled to interest. Since the charged property was realised some two years six months after the winding up of Transbay, the bank had failed to meet the statutory limit of six months under s. 8(2A) of the BA. As such the bank should not be entitled to any interest. The Court of Appeal had therefore erred in allowing interest for period a six months.*

[50] *The question posed by Pilecon Realty is thus answered in the negative.*

[51] *For the above reasons the bank's appeals are dismissed and Pilecon Realty cross appeals are allowed with costs.*

E (emphasis added).

[56] The Federal Court's judgment in *Pilecon Realty Sdn Bhd* has clearly held that reading together s. 291(1), (2) CA, s. 4(1) and (2) CLA with s. 8(2A) BA, if the defendant has not realised its security in Lot No. 31 within the six-month period, the defendant cannot claim any interest after the plaintiff has been wound up on 19 September 2011.

[57] It is not disputed in this case that the defendant has not realised its security in Lot No. 31 within the six-month period. In *Pilecon Realty Sdn Bhd*, the appellant was the defendant. As a matter of *stare decisis*, I am bound by the Federal Court's ruling in *Pilecon Realty Sdn Bhd* to decide that although the indebtedness includes the related companies debts (by reason of the R&R arrangement and the plaintiff's separate arrangement), the indebtedness cannot include interest after 19 September 2011, the date of winding up of the plaintiff.

H *Can Indebtedness Include Costs Of First Suit*

[58] On 5 June 2015, I delivered an oral decision that, among others, the indebtedness should include the related companies debts but not interest after the plaintiff was wound up (oral decision). I then gave time for, among others, the defendant to prepare a draft discharge statement (draft) with the precise amount of indebtedness. Hence, I fix 19 June 2015 for the defendant to submit the draft.

[59] Before 19 June 2015, the defendant filed a written submission and contended that the indebtedness should include the total legal fees paid by the defendant to its solicitors in respect of the first suit (defendant's legal costs in first suit). The defendant's legal costs in first suit totalled RM506,583. The defendant relied on the following clauses in the charge annexure to include the defendant's legal costs in the indebtedness:

(a) Clause 4.1;

(b) Clause 17:

> INFORMATION ON MATTERS AFFECTING SECURITY
>
> *... the [Plaintiff]* and/or the Borrower *agrees that the [Defendant] may if it thinks fit and on behalf of or in the name and at the expense of the [Plaintiff]* and/or the Borrower *do all such acts and employ all such persons as the [Defendant] shall deem fit for the purposes of safeguarding and preserving [Lot No. 31] ... and all costs and expenses incurred by the [Defendant] pursuant to this clause shall be deemed to be a sum advanced by the [Defendant] to the [Plaintiff] and/or the Borrower and secured by this Charge.*
>
> (emphasis added); and

(c) Clause 39.1:

> INDEMNITY
>
> 39.1 *The [Plaintiff] shall at all times hereafter save harmless and keep the [Defendant] indemnified against all losses, actions, proceedings, claims, demands, penalties, damages, costs and expenses which may be brought or made against or incurred by the [Defendant] for any act of default under or breach of any provision or by reason or account of the non-observance of all or any of the stipulations on the part of the [Plaintiff]* and/or the Borrower *contained in any agreements (including the Principal Sale and Purchase Agreement and/or the Related Documents), documents, deeds or correspondences or otherwise howsoever relating to the said Property.*
>
> (emphasis added).

[60] I am not able to include the defendant's legal costs in the indebtedness for the following reasons:

(a) the effect of the defendant's submission to include the defendant's legal costs in the indebtedness, is to claim costs incurred by the defendant in the first suit on an indemnity basis. Order 59 r. 16(4) RC explains the meaning of costs on an indemnity basis as follows:

> *On a determination of costs on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Court may have as to whether the costs were reasonably incurred or were reasonable in*

A

amount shall be resolved in favour of the receiving party; and in these Rules, the term "the indemnity basis", in relation to the determination of costs, shall be construed accordingly.

(emphasis added).

B

The Court of Appeal's decision in first suit only awarded costs to the defendant in the sum of RM25,000 (Court of Appeal's costs order). The Court of Appeal did not award costs of the first suit in the defendant's favour on an indemnity basis. As such, to include the defendant's legal costs in the indebtedness is contrary to the Court of Appeal's costs order;

C

(b) after the Court of Appeal's decision, the defendant's solicitors did not demand at any time for the defendant's legal costs. The amended defence (AD) filed in this case did not plead that the indebtedness should include the defendant's legal costs. In fact, sub-para. 17.4 AD pleaded as follows:

D

The Defendant says the Plaintiff is barred from doing so as the terms of the redemption of Lot 31 must be taken into account together with the R&R Letters and the Redemption Arrangement in light of the fact that the Plaintiff company had prior to its liquidation agreed that Lot 31 shall be redeemed at RM10 million with applicable interest. …

E

(emphasis added).

Sub-paragraph 17.4 AD did not plead that the indebtedness included the defendant's legal costs.

The question of whether the indebtedness can include the defendant's legal costs is not an issue agreed by the plaintiff and defendant to be

F

decided in this case. Nor did SD1's witness statement aver that the indebtedness should include the defendant's legal costs. The first submission of the defendant after the trial (before the oral decision) did not contend that the defendant's legal costs should be part of the indebtedness.

G

In the circumstances, I find that the defendant is estopped by its own conduct of this case from raising the contention that the indebtedness can include the defendant's legal costs. I refer to my earlier decision in *Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors* [2015] 1 LNS 821; [2015] AMEJ 1486 at paras. 11-13 (MLJ), as follows:

H

G. second to 4th and 6th Defendants are estopped from filing Court Enc. No. 91

11. Malaysian courts have recognised the wide application of the estoppel doctrine as illustrated in Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at 294, as follows:

I

The time has come for this Court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

(emphasis added).

12. I now refer to Lord Bridge's judgment (concurred by Lord Diplock, Lord Fraser, Lord Roskill and Lord Brightman) in the House of Lords case of *Langdale & Anor v. Danby* [1982] 3 All ER 129, which has applied the estoppel doctrine in the context of steps taken by one party in legal proceedings. The facts of *Langdale* are different from this case but *Langdale* illustrates that a party in a contentious matter may be estopped from relying on a certain position in the case if the party has earlier conducted his or her case in a manner contrary to that position. I rely on the following judgment of Lord Bridge in *Langdale*, at p. 140:

As I see it the direct result of the conduct of Mr Danby's case before Oliver J was to permit the Langdales to obtain summary judgment. They then spent nearly two years in time and a great deal of money in costs in the course of enforcing that judgment. True it is that part, but part only, of the costs so incurred could be and were set off against the balance of the purchase price of the cottage due to Mr Danby, probably Mr Danby's only significant resource. But now, if the Court of Appeal judgment were to stand, the Langdales would face a full scale trial against a legally-aided defendant in which, though they succeeded, they would have little prospect of recovering any of their costs. Looking at this history in a common sense way, it seems to me beyond argument that the Langdales will have acted to their detriment, on the faith of the conduct of Mr Danby's case which enabled them to obtain summary judgment, by spending large sums to enforce that judgment, if they are now denied the benefit of it by allowing Mr Danby to set up a case which conflicts radically with the case presented on his behalf before Oliver J. Independently of any other ground I would, therefore, hold Mr Danby estopped from arguing the case on which he succeeded in the Court of Appeal.

(emphasis added).

13. Based on the reasons explained in the above sub-paragraphs 10(a) to (h), I have no hesitation to estop the second to 4th and 6th Defendants from proceeding with Court Enc. No. 91 in view of their conduct in respect of Court Enc. No. 29 (especially the first Set of Affirmed Allegations which have yet to be withdrawn, Submission Against Court Enc. No. 29, Oral Stay Application and Appeal Against Decision dated 15 May 2015);

(c) no oral or documentary evidence within the meaning of s. 3 of the Evidence Act 1950 (EA) has been tendered by the defendant in support of the defendant's legal costs. I refer to the definition of "evidence" in s. 3 EA as follows:

A "evidence" includes:

(a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;

B (b) all documents produced for the inspection of the court: such documents are called documentary evidence;

It is not permissible to consider the defendant's written submission made after the oral decision and allow the inclusion of the defendant's legal costs in the computation of indebtedness. This is because written submission of any party cannot constitute "evidence" as understood in
C s. 3 EA;

(d) Clause 4.1 only applies to costs incurred by the defendant:

(i) "in preserving" the charge;

D (ii) "in enforcing or obtaining payment' of" the indebtedness; and

(iii) "in defending or prosecuting or otherwise howsoever taking part in or attending at (whether on a watching brief as observer or otherwise howsoever) any action, enquiry, hearing, suit or other proceedings whatsoever affecting [Lot No. 31]".

E Clause 4.1 does not apply to the defendant's legal costs which has been incurred in respect of the first suit;

(e) Clause 17 only allows the defendant to claim for "expense" for the defendant's acts in "safeguarding and preserving (Lot No. 31)";

F (f) Clause 39.1 provides an indemnity for the defendant against "all losses, actions, proceedings, claims, demands, penalties, damages, costs and expenses" which may be brought against the defendant by a third party in respect of Lot No. 31. There is no suit by any third party against the defendant related to Lot No. 31 which will trigger the application of
G cl. 39.1 in this case; and

(g) Clauses 4.1, 17 and 39.1 have been drafted by the defendant. Even if it is assumed that cls. 4.1, 17 and 39.1 are ambiguous, namely there are two or more interpretations of these provisions, the court should apply the *contra proferentem* rule of construction (*contra proferentem* rule).
H According to the *contra proferentem* rule, cls. 4.1, 17 and 39.1 should be construed strictly against the defendant and if there are two or more interpretations of these provisions, an interpretation of these provisions which is favourable to the plaintiff, should be adopted. An example of the application of the *contra proferentem* rule is the High Court's judgment
I of Zulkefli Makinuddin J (as he then was) in *American International Assurance Co Ltd v. Koay Fong Eng (Administrator of the Estate of Ho Moh Koay, deceased)* [1996] 1 BLJ 379; [1996] 5 MLJ 268, at 274.

A Perpetual Mandatory Injunction Should Be Granted In This Case

[61] After a trial, the court has the discretionary power to grant a perpetual mandatory injunction pursuant to ss. 51(2) and 53 of the Specific Relief Act 1950 (SRA). Sections 51(2) and 53 read as follows:

> Temporary and perpetual injunctions
>
> 51(1) ...
>
> (2) *A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.*
>
> *Mandatory injunctions*
>
> 53. *When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction* to prevent the breach complained of, and also *to compel performance of the requisite acts.*
>
> (emphasis added).

[62] In *Ng Yee Fong & Anor v. EW Talalla* [1985] 1 LNS 146; [1986] 1 MLJ 25, the Supreme Court in a judgment delivered by Mohd Azmi SCJ, affirmed a perpetual mandatory injunction ordered by the High Court after a trial. The perpetual mandatory injunction in *Ng Yee Fong* directed the appellants to remove their septic tank from the respondent's land.

[63] Based on the above reasons, this court should exercise its discretion under ss. 51(2) and 53 SRA to give the plaintiff a perpetual mandatory injunction ordering the defendant to provide to the plaintiff a discharge statement which contains the indebtedness (as explained above).

Defendant Cannot Exercise Right Under s. 271(1)(a) NLC

[64] Sections 270 and 271 NLC provide as follows:

> *CHAPTER 4*
>
> *REMEDIES OF CHARGEES: POSSESSION*
>
> *LIMITED APPLICATION OF POWERS UNDER THIS CHAPTER*
>
> *270. Limitation of powers to certain lands, and to first chargees only*
>
> *(1) The powers conferred by this Chapter:*
>
> *(a) shall not be exercisable in relation to any land held under Land Office title or the corresponding form of qualified title;*
>
> (aa) shall not be exercisable in the case of any charge of an undivided share in alienated land; and
>
> (b) shall, in the case of any town or village land not falling within paragraph (a), be exercisable only in so far as the land is not occupied by the chargor.

A (2) *Subject to sub-section (3), the said powers shall be exercisable by first chargees only.*

(3) The Minister may, by order made on the recommendation of the National Land Council, provide in any State for the exercise of the said powers by second and subsequent chargees; and any such order
B may modify the provisions of this Chapter to such extent, and in such manner, as may appear to the Minister and the Council necessary or desirable for the purpose.

RIGHT TO POSSESSION

271. Power of chargee to take possession on any default by chargor.

C (1) *Subject to section 270, any chargee may, at any time when the chargor is in breach of any agreement on his part expressed or implied in the charge, enter into possession of the whole or any part of the charged land or, as the case may be, the land comprised in the charged lease:*

D (a) *so far as it is subject to any lease or tenancy binding on him, by receiving the rent payable to the chargor thereunder; and*

(b) so far as it is not so subject, by going into occupation thereof.

(2) The exercise of his powers under this section by a chargee of any lease shall not constitute a breach of any provision thereof, express or implied, restricting the right of the lessee to part with the
E possession of the demised property.

(emphasis added).

[65] The defendant submits as follows in support of the validity of the first and second Forms 16J:

F (a) the defendant is the first chargee of Lot No. 31. As such, s. 270(2) NLC has been complied with;

(b) Lot No. 31 is held under a "qualified" RT whereby the defendant may exercise the chargee's remedy of possession under ss. 270(1)(a) and 271(1)(a) NLC. According to the defendant's learned counsel,
G the phrase "any land held under land office title or the corresponding form of qualified title" in s. 270(1)(a) NLC should be construed by using the *"ejusdem generis"* rule of interpretation (*Ejusdem Generis* Rule). Applying the *Ejusdem Generis* Rule to s. 270(1)(a) NLC:

H (i) there is a specific category in s. 270(1)(a) NLC, namely "land office title" which precedes the general words of "corresponding form of qualified title";

(ii) according to the *Ejusdem Generis* Rule, where general words
I follow specific words, such general words take their meaning from the specific words and the meaning of the general words is restricted to the same genus as the specific words; and

(iii) the general phrase "corresponding form of qualified title" must mean the corresponding form of qualified land office title. Accordingly, s. 270(1)(a) NLC does not apply to qualified RT such as in this case. Consequently, the defendant is not barred by s. 270(1)(a) NLC and may exercise powers under s. 271(1)(a) NLC to issue the first and second Forms 16J;

(c) the defendant also relies on the "explanatory note" to the NLC Bill to support the above interpretation of s. 270(1)(a) NLC; and

(d) the plaintiff has breached the charge when the plaintiff is wound up and when the plaintiff fails to obtain the defendant's prior written consent before letting out Lot No. 31 to the tenant. The defendant asserts that the plaintiff did not make the defendant a party to the plaintiff's application for the winding up court's leave for liquidator to let out Lot No. 31. In fact, the defendant has not been served with the cause papers in respect of the winding up court's leave for liquidator to let out Lot No. 31. The defendant was not even aware of the winding up court's leave for liquidator to let out Lot No. 31. Accordingly, the defendant is not bound by the winding up court's leave for liquidator to let out Lot No. 31. The defendant relies on Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Re Thien Kon Thai* [2008] 6 MLJ 278.

[66] Firstly, I am of the view that in light of the defendant's breach (in not providing the discharge statement upon two requests from the plaintiff), the defendant cannot exercise its rights under the charge to issue any Form J. If otherwise, a party who has breached an agreement (defaulting party) will be able to exploit the defaulting party's own wrong by enforcing the very agreement breached by the defaulting party. In *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489, at p. 581 (CLJ); 492 (MLJ) (*Swee Lin Sdn Bhd*), Gopal Sri Ram JCA delivered the following judgment in the Court of Appeal:

> Quite apart from the construction of para 1(3)(b) of the First Schedule, *there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage if his own breach.* See *Alghussein Establishment v. Eton College* [1988] 1 WLR 587, *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.
>
> *But as I have said, the principle is of universal application.*
>
> (emphasis added).

[67] I now turn to the question of whether s. 270(1)(a) NLC bars the defendant's remedy of possession under s. 271(1)(a) NLC. This depends on whether the phrase "corresponding form of qualified title" in s. 270(1)(a) NLC applies to a qualified RT (Lot No. 31 is held under a qualified RT). I am not able to find any Malaysian case which has construed s. 270(1)(a) NLC, let alone interpret the phrase "corresponding form of qualified title" therein. I am also not able to find provisions in the legislation of Australia and New Zealand (which apply the Torrens land law system) which are similar to ss. 270 and 271 NLC.

[68] I am of the opinion that there are two separate limbs of s. 270(1)(a) NLC, namely:

(a) any land held under land office title; and

(b) any land held under corresponding form of QT

(disjunctive interpretation).

[69] The disjunctive interpretation is premised on the following reasons:

(a) it is clear from the long title to NLC (An Act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith) that Parliament has intended NLC to be a code of land law. To interpret a code of law, I refer to the following two cases:

(i) Gopal Sri Ram JCA (as he then was) decided as follows in the Court of Appeal case of *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal* [2004] 1 CLJ 797, at 805-806:

> *It is a cardinal guide of statutory interpretation that when a statute lays down a specific code or formula to meet a particular mischief of the common law, it is not open to the courts to treat themselves as at liberty to continue to apply the common law in disregard of statute. The point was made in as plain language as can be by Lord Herschell in Bank of England v. Vagliano Bros [1891] AC 107 (at p. 144):*
>
> > *I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, ...* (emphasis added); and

(ii) in *Datin Siti Hajar v. Murugasu* [1970] 1 LNS 23; [1970] 2 MLJ 153, at 156, Syed Agil Barakbah J (as he then was) held as follows in the High Court:

> Moreover, the purpose of the National Land Code is provided by its long title: "An Act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Terengganu, and for purposes connected therewith." *The rule of construction is that an amending and consolidating Act implies both addition to, and derogation from, the pre-existing law, but such an Act is a complete Code in itself as regards the subjects it deals with. This appears to be the resulting implication of the views of Lord Herschell in Bank of England v. Vagliano Brothers* [1891] AC 107 in the Privy Council when considering the Bills of Exchange Act, 1882. In *Despatie v. Tremblay* [1921] 1 AC 702 709, also a Privy Council case, Lord Moulton cited with approval the language used by Lord Herschell in the case cited above, and said in relation to the interpretation of a statute:
>
> > *From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed*.
>
> In the same passage his Lordship quoted Lord Herschell and said:
>
> > The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities.
>
> **In my view, the National Land Code is a complete and comprehensive code by itself with regard to the acquisition of the right of way**.
>
> (emphasis added).

Based on the two above cases, a code of law, such as the NLC, should be interpreted literally as the NLC is intended by Parliament to be a complete and comprehensive statute regarding land law. The literal rule of construction supports the disjunctive interpretation as is clear from the interpretation provision of s. 5 NLC. "QT" is defined in s. 5 NLC to mean "title issued under Chapter 2 or 3 of Part Eleven (ss. 180-188 NLC), that is to say, **in advance of survey**" (emphasis added). Section 5 NLC defines "land office title" as "title evidenced by a Mukim grant or Mukim lease, or by any document of title registered in a land office under the provisions of any previous land law". It is clear that under s. 5 NLC, a QT is distinct from a land office title. Hence, the disjunctive interpretation.

The importance of an interpretation provision, such as s. 5 NLC, has been explained by the Federal Court's judgment delivered by Augustine Paul FCJ in *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537; [2006] 1 MLJ 1, at 550 (CLJ); 10-11 (MLJ), as follows:

> *The Act [Income Tax Act 1967 has therefore given an extended meaning to the word 'executor' by including in its definition a person administering or managing the estate of a deceased person. As the definition is clear and unambiguous it cannot be ignored. As Bindra's Interpretation of Statutes (7th Ed) says at p 39:*
>
> > *When a Legislature defines the language it uses, its definition is binding upon the Court and this is so even though the definition does not coincide with the ordinary meaning of the word used. It is not for the Court to ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it (Nand Rao v. Arunachalam AIR 1940 Mad 385). If the Legislature's intention is clear and unambiguous, it is obviously outside the jurisdiction of the Court to correct or amend the definition in the interpretation clause (Mordhwaj Singh v. State of UP 24).*
>
> [14] *Any reference in the Act to an 'executor' must therefore be construed in the light of its definition in s. 2. …*
>
> (emphasis added);

(b) the use of the word "or" in s. 270(1)(a) NLC supports the disjunctive interpretation. I refer to the Court of Appeal case of *Union Insurance (M) Sdn Bhd v. Chan You Young* [1999] 3 CLJ 517; [1999] 1 MLJ 593, at 531 and 537 (CLJ); 606 and 612 (MLJ), wherein Abdul Malek Ahmad JCA (as he then was) held as follows:

> *With the word 'or' in the words 'by reason of or in pursuance of a contract of employment' means, to the learned High Court judge, that it should be read disjunctively. To read it conjunctively, he emphasised, would be doing violence to the word 'or'.* He concluded that in reading disjunctively, the wife could obtain satisfaction as regards the judgment in the first suit against the insurance company by reason of her contract of employment with Tharmarajoo.
>
> *To fortify his reasoning, he stated at p. 37 of his judgment as follows:*
>
> > *The Pocket Oxford Dictionary defines the word 'or' as 'introducing alternatives.' The Britannica World Language Dictionary defines 'or' as 'the alternative expressed by or is emphasised by prefixing to the first member, or adding after the last.' Put in another way, when there are several possibilities 'or' is placed before the last one. This means that when the word 'or' is used there is a choice to be made, between one or the other and not to accept both of them. Thus, the word 'or' appearing in the bracketed words of cl. 9 endorsement D reflects the intention of the insurance company to construe the word 'or' as disjunctive and not conjunctive.*

…

After dutifully deliberating on the arguments and authorities and for the reasons stated earlier, we can find no justification to differ with the conclusion reached by the learned trial judge and the appeal judge in the court below on both the issues.

(emphasis added);

If I have adopted the defendant's contention, this will be contrary to Parliament's use of the disjunctive "or" in s. 270(1)(a) NLC;

(c) the Federal Court interpreted the then applicable s. 66(1) of the Courts of Judicature Act 1964 (CJA) in *Gurbachan Singh v. Public Prosecutor* [1967] 1 LNS 50; [1967] 2 MLJ 220. Section 66(1) CJA contained two different phrases. Azmi CJ (Malaya) (as he then was) decided as follows in *Gurbachan Singh*, at 222:

In this sub-section [s. 66(1) CJA] two different words connecting different meanings are intentionally used and in our view there cannot be any doubt that these words shall have their usual meaning.

(emphasis added).

Based on *Gurbachan Singh*, s. 270(1)(a) NLC has two different phrases and these two phrases must be intended by the Legislature to have two different meanings; and

(d) if this court accepts the defendant's submission that the meaning of the phrase "corresponding form of qualified title" (second limb) in s. 270(1)(a) NLC is confined by the preceding phrase "land office title" (first limb), this will render the second limb redundant. Such an approach will be contrary to the canon of construction that the Legislature does not legislate in vain. In *All Malayan Estates Staff Union v. Rajasegaran & Ors* [2006] 4 CLJ 195; [2006] 5 AMR 585, at 213 (CLJ) 600-601 (MLJ), Augustine Paul FCJ explained as follows in the Federal Court:

The legislature is deemed not to waste its words or to say anything in vain (see Quebec Railway, Light, Heat and Power Co Ltd v. Vandry AIR 1920 PC 181). In The King v. Berchet [1688] 1 Show 106 it was held that it is a well-known rule in the interpretation of statutes that such a sense is to be made upon the whole so that no clause, sentence or word shall prove superfluous, void or insignificant if by any other construction they may all be made useful and pertinent. Thus it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute (see Aswini Kumar Ghose v Arabinda Bose AIR 1952 SC 369).

(emphasis added)

[70] With respect to the defendant's learned counsel, I cannot apply the *Ejusdem Generis* Rule due to the following reasons:

(a) the application of the *Ejusdem Generis* Rule will be contrary to the reasons given in the above para. 69; and

(b) in *Haji Abdul Ghani Ishak & Anor v. Public Prosecutor* [1981] 1 LNS 96; [1981] 2 MLJ 230, the Federal Court considered the phrase "pecuniary or other advantage" in s. 2(2) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 (EO). Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) decided as follows in *Haji Abdul Ghani bin Ishak*, at p. 247:

> *The use in [s. 2(2) EO] of the words "pecuniary or other advantage" is significant. The word "other" appearing in the context of the definition is not caught by the ejusdem generis rule. We are fortified in this view by the statement of Lord Diplock to this very effect in Quazi v. Quazi [1979] 3 All ER 897, 902 and it might perhaps be useful to set out this part of his judgment in extenso*:
>
> > It was not the husband's case that the divorce by talaq was obtained in Pakistan by proceedings that were 'judicial'; it is the reference in the section to 'other proceedings' on which he relied. *The argument for the wife is that these words, which on the face of them would include any proceedings that were not judicial, are to be read as limited to proceedings that are quasi judicial, by application of the ejusdem generis rule. This involves reading 'other' as if it meant 'similar' and, as it seems to me, is based on a misunderstanding of that wall-known rule of construction that is regrettably common. As the Latin words of the label attached to it suggest the rule applies to cut down the generality of the expression 'other' only where it is preceded by a list of two or more expressions having more specific meanings and sharing some common characteristics from which it is possible to recognise them as being species belonging to a single genus and to identify what the essential characteristics of that genus are. The presumption then is that the draftsman's mind was directed only to that genus and that he did not, by his addition of the word 'other' to the list, intend to stray beyond its boundaries, but merely to bring within the ambit of the enacting words those species which complete the genus but have been omitted from the preceding list either inadvertently or in the interests of brevity. Where, however, as in section 2 of the Recognition Act, the word 'other' as descriptive of proceedings is preceded by one expression only that has a more specific meaning, viz 'judicial', there is no room for the application of any ejusdem generis rule; for unless the draftsman has indicated at the very least two different species to which the enacting words apply there is no material on which to base an inference that there was some particular genus of proceedings to which alone his mind was directed when he used the word 'other', which on the face of it, would embrace all proceedings that were not judicial, irrespective of how much or little they resembled judicial proceedings.*
>
> *Therefore the word "advantage" is also to be construed widely.*
>
> (emphasis added)

The Federal Court decided *Haji Abdul Ghani bin Ishak* as our apex court because by then, appeals to the Privy Council in respect of constitutional and criminal matters had already been abolished by the Courts of Judicature (Amendment) Act 1976 (Act A328). It is clear from our then apex court in *Haji Abdul Ghani bin Ishak* that the *ejusdem generis* rule cannot be invoked to construe s. 270(1)(a) NLC because:

(i) the first limb does not "list of two or more expressions having more specific meanings and sharing some common characteristics from which it is possible to recognise them as being species belonging to a single genus and to identify what the essential characteristics of that genus are". There is therefore no specific genus or class in the first limb for the *ejusdem generis* rule to be triggered in respect of the second limb; and

(ii) even if it is assumed that there is a certain genus specified in the first limb, there is no preceding word "other" in the second limb to show that the meaning of the second limb is confined to the genus created in the first limb.

[71] When the words of a statutory provision are clear, there is no need to resort to the "explanatory statement" of the statute in question (ES). I rely on the following opinion of the Privy Council delivered by Lord Roskill in an appeal from Malaysia, *Chin Choy & Ors v. The Collector of Stamp Duties* [1981] CLJ 37; [1981] CLJ (Rep) 1; [1981] 2 MLJ 47, at 4 (CLJ); 48 (MLJ):

> *Learned counsel for the appellant invited their Lordships' attention to the text of the bill which led to the enactment of the Stamp (Amendment) Act of 1967 and thus to the introduction of section 12A. His purpose in so doing was to draw attention to the relevant part of the explanatory statement dealing with what became section 12A of that Act. That relevant part stated that this provision was designed to prevent evasion by "the common practice of under-valuing the property by showing a false consideration, less than the true consideration, in the instrument of transfer". Learned counsel asserted that this was the mischief at which the new provision was aimed and accordingly the section should not be construed as having a wider effect than was necessary in order to achieve that stated purpose. Their Lordships are quite unable to accept this reasoning. Even if it were permissible to have regard to this part of the explanatory statement for the purpose of construing the section, its existence could not properly be used to give to the words of the statute a more restricted meaning than that which those words naturally bear upon their true construction. It by no means follows that because the relevant provision was aimed at one particular target its effect may not have been more far-reaching*.
>
> (emphasis added).

Based on *Chin Choy*, if I have confined the clear and literal meaning of s. 270(1)(a) NLC by reference to the ES, this will amount to a judicial re-writing of that provision which is not legally permissible.

[72] In respect of the defendant's allegation that the plaintiff has breached the charge when the plaintiff is wound up and/or the plaintiff has failed to obtain the defendant's prior written consent before letting out of Lot No. 31 to the tenant (alleged breaches by plaintiff), my decision is as follows:

(a) the defendant has not filed any counterclaim in this case regarding the alleged breaches by plaintiff. Hence, the defendant cannot rely on the alleged breaches by plaintiff in this case; and

(b) in any event, as the defendant's breach (defendant's failure to provide a discharge statement upon the plaintiff's request) has been committed, the defendant cannot take advantage of the defendant's breach and rely on the alleged breaches by plaintiff – please see *Swee Lin Sdn Bhd*, at p. 492.

[73] Before I move to the next subject matter of my decision, I agree with the defendant's contention that the defendant is not bound in any manner by the winding up court's leave for liquidator to let out Lot No. 31. This is because firstly, the defendant is not a party which is involved in the winding up court's leave for liquidator to let out Lot No. 31. Furthermore, the legality of the first and second Form 16J as well as the interpretation of s. 270(1)(a) NLC, are not issues before the winding up court.

Should A Perpetual Restraining Injunction Be Ordered In This Case?

[74] Section 50 SRA provides as follows:

> **Preventive relief how granted**
>
> 50. *Preventive relief is granted at the discretion of the court by injunction,* temporary or *perpetual.*
>
> (emphasis added).

[75] It is clear that a trial court has the discretion under ss. 50 and 51(2) SRA to grant a perpetual restraining injunction after a trial. Based on the above reasons, I am satisfied that the defendant cannot issue Form 16J by reason of s. 270(1)(a) NLC. Accordingly, I exercise my discretion under ss. 50 and 51(2) SRA to order a perpetual injunction to restrain the defendant from exercising any right in respect of Lot No. 31 under s. 271 NLC.

Is This Action A Duplicity And Abuse Of Court Process

[76] The defendant has contended that as the plaintiff has filed the first suit and the Federal Court application is still pending, this action by the plaintiff is a duplicity (in view of the first suit) and constitutes an abuse of court process.

[77] I am not able to accept the above submission by the defendant because this action involves the following five questions which do not arise for determination in the first suit:

(a) whether the defendant as a chargee of Lot No. 31 is obliged under the charge to provide a discharge statement to the plaintiff as the registered proprietor of Lot No. 31;

(b) if the defendant is bound to provide a discharge statement to the plaintiff under the charge and has failed to do so, has the plaintiff suffered any claimable loss or damage from such a failure by the defendant;

(c) if the plaintiff is entitled to a discharge statement to be given by the defendant under the charge, how should the indebtedness be computed;

(d) if the indebtedness includes interest, can the defendant claim interest after the plaintiff's winding up under s. 291(1), (2) CA, s. 4(1) and (2) CLA read together with s. 8(2A) BA; and

(e) whether the defendant is barred by s. 270(1)(a) NLC from exercising any right as a chargee under s. 271(1)(a) NLC to receive rent from the tenant.

[78] In respect of the defendant's purported right to exercise remedy as a chargee under s. 271(1)(a) NLC, it is trite law that there can be no application of the issue estoppel doctrine against the operation of a statutory provision (in this case, the application of s. 270(1)(a) NLC). I cite the following cases:

(a) in *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 CLJ 656; [1991] 1 CLJ (Rep) 174; [1991] 1 MLJ 404, at 179 (CLJ); 407 (MLJ), Hashim Yeop Sani CJ (Malaya) held in the Supreme Court as follows:

> *On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions.*
>
> (emphasis added);

(b) Thomas CJ decided as follows in the Court of Appeal of the Federated Malays States in *Puran Singh v. Kehar Singh Bahadur Singh* [1937] 1 LNS 51; [1939] 1 MLJ 71, at 75:

> The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, *viz*., an invalid power of attorney, and that it was in consequence void under section 42 (iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention he cited *Borrow*'s case (1880) 14 ChD 432 in which it is stated by Bacon, V.C., in the course of his judgment that:
>
> > *the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament*.

A

> This view is followed in the case of *Abdul Aziz v. Kanthen Mallik* 38 ILR Cal 512, 515 in which at page 515 a long list of authorities has been set out. *The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act*. …
>
> *So far as this is an argument on the question of estoppel it cannot in my opinion succeed, since it is only another way of saying that acts of the parties inter se can amount to an estoppel in respect of an Enactment*.
>
> (emphasis added); and

C (c) in *Re Salvage Engineers Ltd* [1962] 1 LNS 167; [1962] 1 MLJ 438, at 440, Ong J (as he then was) held in the High Court:

> There can be no estoppel against the operation of a statute.

[79] It is to be noted that the defendant has not applied to court to strike out this suit on the ground that such an action constitutes an abuse of court process under O. 18 r. 19(1)(d) and O. 92 r. 4 RC as well as the court's inherent jurisdiction.

Summary Of Court's Decision

[80] In view of the above reasons, this court makes the following orders, among others:

(a) a declaration that the plaintiff is entitled to discharge the charge after paying the defendant the indebtedness which consists of only the following:

F (i) the outstanding principal sum due from the plaintiff to the defendant under the banking facilities; and

(ii) the related companies' debts with interest agreed by the plaintiff to be paid under the R&R arrangement and the plaintiff's separate arrangement up to 19 September 2011, the date of the plaintiff's winding up;

G

(b) a perpetual mandatory injunction to compel the defendant to deliver to the plaintiff a statement of discharge which contains the sum of indebtedness;

H (c) a perpetual restraining injunction is granted to restrain the defendant from exercising any right in respect of Lot No. 31 under s. 271 NLC; and

(d) costs of this suit to be paid by the defendant to the plaintiff.

I